



February 22, 2018

VIA ELECTRONIC MAIL

Wanda Calderon
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US EPA Region 2
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New York, New York 10007-1866
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Re: Expedited Freedom of Information Act Request

Dear Freedom of Information Officer:

Pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552 et seq. and the implementing regulations of the Environmental Protection Agency (EPA), 40 C.F.R. Part 2, I—Yessenia Funes, reporter of Gizmodo Media Group—make the following request for records.

On Sept. 20, Hurricane Maria hit the island of Puerto Rico. EPA Public Affairs Specialist Elizabeth Sundin informed us that the Battery Recycling Superfund site in Arecibo, Puerto Rico, suffered some flooding in the hurricane's wake. In light of this knowledge, the concern residents of Arecibo has voiced to us, and prior incidents related to the Battery Recycling Company's site (before becoming a Superfund) where the EPA knew lead was leaching and failed to act in a timely manner to avoid a health crisis¹, we seek to shed light on the extent of the flooding that occurred after Hurricane Maria, and any contamination that may have resulted from it.

Requested Records

We request that EPA produce the following communications **between it and any government official with the Arecibo municipality, including but not limited to, Mayor Carlos Molina and his administration** within twenty business days and further seek expedited review of this request for the reasons identified below.

1. Communications related to the municipality of Arecibo's response to or requests for federal assistance related to Hurricane Maria
2. Communications regarding any water, soil, or any other environmental contamination concerns as a result of Hurricane Maria.
3. Communications about the Battery Recycling Superfund site

¹ Centers for Disease Control and Prevention — <https://www.cdc.gov/mmwr/preview/mmwrhtml/mm6147a4.htm>

Please provide all responsive records from September 20, 2017, through the date of the search. The search for responsive records should include all individuals and locations where records are likely to exist.

In addition to the records requested above, we request records describing the processing of this request, including records sufficient to identify search terms used and locations and custodians searched and any tracking sheets used to track the processing of this request. If the EPA uses FOIA questionnaires or certifications completed by individual custodians or components to determine whether they possess responsive materials or to describe how they conducted searches, we also request any such records prepared in connection with the processing of this request.

We seek all responsive records **regardless of format, medium, or physical characteristics**. In conducting your search, please understand the term “communications” in its broadest sense, to include any written, typed, recorded, graphic, printed, or audio material of any kind. We seek records of any kind, including electronic records, audiotapes, videotapes, and photographs, as well as letters, emails, facsimiles, telephone messages, voice mail messages and transcripts, notes, or minutes of any meetings, telephone conversations or discussions. Our request includes any attachments to these records. No category of material should be omitted from search, collection, and production.

You may not exclude searches of files or emails in the personal custody of your officials, **such as personal email accounts**. Records of official business conducted using unofficial systems or stored outside of official files is subject to the Federal Records Act and FOIA.² It is not adequate to rely on policies and procedures that require officials to move such information to official systems within a certain period of time; we have a right to records contained in those files even if material has not yet been moved to official systems or if officials have, through negligence or willfulness, failed to meet their obligations.³ If any potentially responsive records have been destroyed and/or transferred to other agencies or offices, such as the National Archives and Records Agency (NARA), then I request copies of the destruction or transfer slips as well as any other documentation relating to, mentioning or describing said transfer or destruction, to include but not be limited to confirmation that the EPA has no other copies of said records.

In addition, please note that in conducting a “reasonable search” as required by law, you must employ the most up-to-date technologies and tools available, in addition to searches by individual custodians likely to have responsive information. Recent technology may have rendered the EPA’s prior FOIA practices unreasonable. In light of the government-wide requirements to manage information electronically by the end of 2016, it is no longer reasonable to rely exclusively on custodian-driven searches.⁴ Furthermore, agencies that have adopted the NARA Capstone program, or similar policies, now maintain emails in a form that is reasonably likely to be more complete than individual custodians’ files. For example, a custodian may have deleted a responsive email from his or her email program, but the EPA’s archiving tools would capture that email under Capstone.

² See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149–50 (D.C. Cir. 2016); cf. *Judicial Watch, Inc. v. Kerry*, 844 F.3d 952, 955–56 (D.C. Cir. 2016)

³ See *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, No. 14-cv-765, slip op. at 8 (D.D.C. Dec. 12, 2016) (“The Government argues that because the agency had a policy requiring [the official] to forward all of his emails from his [personal] account to his business email, the [personal] account only contains duplicate agency records at best. Therefore, the Government claims that any hypothetical deletion of the [personal account] emails would still leave a copy of those records intact in [the official’s] work email. However, policies are rarely followed to perfection by anyone. At this stage of the case, the Court cannot assume that each and every work-related email in the [personal] account was duplicated in [the official’s] work email account.” (citations omitted))

⁴ Presidential Memorandum—Managing Government Records, 76 Fed. Reg. 75,423 (Nov. 28, 2011), <https://obamawhitehouse.archives.gov/the-press-office/2011/11/28/presidential-memorandum-managing-government-records>; Office of Mgmt. & Budget, Exec. Office of the President, Memorandum for the Heads of Executive Departments & Independent Agencies, “Managing Government Records Directive,” M-12-18 (Aug. 24, 2012), <https://www.archives.gov/files/records-mgmt/m-12-18.pdf>

Accordingly, we insist that the EPA **use the most up-to-date technologies to search for responsive information** and take steps to ensure that the most complete repositories of information are searched.

Under the FOIA Improvement Act of 2016, agencies must adopt a presumption of disclosure, withholding information “only if . . . disclosure would harm an interest protected by an exemption” or “disclosure is prohibited by law.”⁵ If it is your position that any portion of the requested records is exempt from disclosure, we request that you **provide an index of those documents** as required under *Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973), cert. denied, 415 U.S. 977 (1974). As you are aware, a Vaughn index must describe each document claimed as exempt with sufficient specificity “to permit a reasoned judgment as to whether the material is actually exempt under FOIA.”⁶ Moreover, the Vaughn index “must describe *each* document or portion thereof withheld, and for *each* withholding it must discuss the consequences of disclosing the sought-after information.”⁷ Further, “the withholding agency must supply ‘a relatively detailed justification, specifically identifying the reasons why a particular exemption is relevant and correlating those claims with the particular part of a withheld document to which they apply.’”⁸

In the event some portions of the requested records are properly exempt from disclosure, **please disclose any reasonably segregable nonexempt portions of the requested records**. If it is your position that a document contains non-exempt segments, but that those non-exempt segments are so dispersed throughout the document as to make segregation impossible, please state what portion of the document is non-exempt, and how the material is dispersed throughout the document.⁹ Claims of non-segregability must be made with the same degree of detail as required for claims of exemptions in a Vaughn index. If a request is denied in whole, please state specifically that it is not reasonable to segregate portions of the record for release.

You should **institute a preservation hold** on information responsive to this request. We intend to pursue all legal avenues to enforce its right of access under FOIA, including litigation if necessary. Accordingly, the EPA is on notice that **litigation is reasonably foreseeable**.

Expedited Processing

Pursuant to 5 U.S.C. § 552(a)(6)(E) and 40 C.F.R. § 2.104(e), we request that the EPA expedite the processing of this request. **We certify to be true and correct to the best of our knowledge and belief**, that there is an urgent need to inform the public about the federal government activity that is the subject of this request.

Expedited processing is to be granted under the federal statute “in cases in which the person requesting the records demonstrates a compelling need” or “in other cases determined by the agency.” As defined by statute, “compelling need” means that (a) “failure to obtain requested records on an expedited basis under this paragraph could reasonably be expected to pose an imminent threat to the life or physical safety of an individual”; or (b) “with respect to a request made by a person primarily engaged in disseminating information, urgency to inform the public concerning actual or alleged Federal Government activity.”

Our request satisfies both of these conditions and we ask that our request for expedited processing be approved based on either or both.

⁵ FOIA Improvement Act of 2016 § 2 (Pub. L. No. 114–185)

⁶ *Founding Church of Scientology v. Bell*, 603 F.2d 945, 949 (D.C. Cir. 1979)

⁷ *King v. U.S. Dep’t of Justice*, 830 F.2d 210, 223–24 (D.C. Cir. 1987) (emphasis in original)

⁸ *Id.* at 224 (citing *Mead Data Central, Inc. v. U.S. Dep’t of the Air Force*, 566 F.2d 242, 251 (D.C. Cir. 1977))

⁹ *Mead Data Central*, 566 F.2d at 261

First, the contamination at Superfund sites can, under flood conditions, leach into water supplies and get people sick. For instance, following Hurricane Harvey, which brought torrential rains to Houston last summer, the EPA indicated that an unknown amount of dangerous chemicals could have washed down river from a Texas Superfund site.¹⁰¹¹ The Battery Recycling Center Superfund site is one of the newest additions to the EPA's Superfund sites, and cleanup has just begun. The site is known to contain dangerous levels of lead, which can cause developmental and other brain issues to children younger than 6, in particular. Soil scientist Benjamin Bostick with Columbia University is even launching his own study to examine Superfund site contamination throughout the island, including in Arecibo, citing the fact that flooding from Hurricane Maria "almost certainly" spread poisons to groundwater.¹²

The records responsive to this request are necessary for the public to effectively participate as informed citizens in the debate regarding how the Trump administration responded to Hurricane Maria and the ensuing humanitarian crisis. It is crucial that the public receives complete information about the federal government's activities so as to inform the public of any deficiencies or errors in the government's handling of this life-threatening disaster—deficiencies or errors that can reasonably be expected to pose an imminent threat to the life or physical safety of numerous individuals, now and in disasters to come. For people on the mainland, many of these American citizens in Puerto Rico include family and friends. It's imperative they know whether their health and lives are being protected.

Second, Gizmodo, which employs both requesters as investigative reporters, is an organization "primarily engaged in disseminating information."¹³ (finding that Gizmodo is a "representative of the news media" because it "gathers information of potential interest to a segment of the public, uses its editorial skills to turn the raw material into distinct work, and distributes that work to an audience.") And this request involves responsive records *urgently needed* to "inform the public concerning actual or alleged Federal Government activity." The information we seek concerns "a matter of a current exigency to the American public."¹⁴

In 2013, the D.C. Circuit court noted that "courts have found a 'compelling need' to exist when the subject matter of the request was central to a pressing issue of the day."¹⁵ The Court noted that "[i]n cases where compelling need was found, plaintiff's cited numerous articles and reporters, including many in mainstream news sources such as the *New York Times*, the *Washington Post*, the *Los Angeles Times*, and/or the *San Francisco Chronicle*."¹⁶

The courts found that the issue of news coverage is especially critical to courts in determining whether a "compelling need" exists for expedited FOIA processing, asserting, for example, that the "ultimate conclusion" with regards to expedited processing relies on important underlying facts, such as "the

¹⁰ The Associated Press —

<http://www.latimes.com/nation/nationnow/la-na-harvey-houston-pollution-20170929-story.html>

¹¹ Environmental Protection Agency —

<https://www.epa.gov/newsreleases/epa-statement-san-jacinto-river-waste-pits-superfund-site-data>

¹² Columbia University —

<http://www.ldeo.columbia.edu/news-events/upcoming-scientific-fieldwork-2018-and-beyond>

¹³ *Am. Civil Liberties Union v. Department of Justice*, 321 F. Supp. 2d 24, 29 n.5 (D.D.C. 2004)

¹⁴ *Al-Fayed v. Cent. Intelligence Agency*, 254 F.3d 300, 310 (D.C. Cir. 2001) ("Al-Fayed") (quoting H.R. Rep. No. 104-795, at 26 (1996), reprinted in 1996 U.S.C.A.N. 3448, 3469).

¹⁵ *Wadelton v. Department of State*, 13-0412 ESH, 2013 WL 1760853 (D.D.C. Apr. 25, 2013)

¹⁶ *Id.*

credibility of a claimant's allegations regarding government activity, the existence of a threat to physical safety, *or whether an issue is the subject of news coverage.*"¹⁷

Fee Waiver

In accordance with 5 U.S.C. § 552(a)(4)(A)(iii) and 40 C.F.R. § 2.107(I), we request a waiver of fees associated with processing this request for records. The subject of this request concerns the operations of the federal government, and the disclosures will likely contribute to a better understanding of relevant government procedures by the general public in a significant way.

Moreover, Gizmodo is an online news organization and therefore we are entitled to a fee waiver on the grounds that disclosure of the information sought is in the public interest because it is likely to contribute significantly to public understanding of the operations or activities of the government and is not primarily in the commercial interest of the requester.

Regardless, we are willing to pay fees for this request up to \$50 without prior approval. If you estimate that the fees will exceed this limit, please notify me first.

Further Correspondence

Where possible, please provide responsive material in electronic format by email (yessenia.funes@gizmodomedia.com) or in PDF or TIF format on a USB drive. Please send any responsive material being sent by mail to: Gizmodo Media Group (% Yessenia Funes), 2 West 17th Street, 2nd Floor, New York, NY 10011.

Finally, **we request rolling production of these records** as they are located and reviewed.

We look forward to working with the EPA on this request. If you do not understand any part of this request, have any questions, or foresee any problems in fully releasing the requested records, please contact Yessenia Funes at yessenia.funes@gizmodomedia.com. Also, if our request for a fee waiver is not granted in full, please contact us immediately upon making such a determination.

Please be aware that under 5 U.S.C. § 552(a)(6)(A), a FOIA request is considered constructively denied after twenty business days and is subject to an appeal on that basis.

Thank you for your prompt attention to this request.

Sincerely,

Yessenia Funes

¹⁷ *Al-Fayed* at 308.